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No. 90-1628

In the Supreme Court of the United States

OCTOBER TERM, 1991

GREGORY LYNN CUMMINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, after finding that the police had probable cause to stop petitioner's car for a traffic violation, properly declined to inquire whether the stop was pretextual.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A13) is reported at 920 F.2d 498.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1990. A petition for rehearing was denied on January 17, 1991. Pet. App. A14. The petition for a writ of certiorari was filed on April 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On his conditional plea of guilty in the United States District Court for the Eastern District of

Arkansas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841 and 18 U.S.C. 2, and carrying a weapon during a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced to a term of imprisonment for 91 months, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. A3-A13.

1. On November 10, 1988, at approximately 11:40 p.m., Officer Bernal of the Little Rock, Arkansas, police force was in his patrol car. While Bernal was stopped at a red light, his attention was caught by a green Volkswagen driven by petitioner. The Volkswagen, which was stopped at the same intersection, remained stopped even though it had a green light, and petitioner and his passenger, Timothy Akins, kept glancing towards Bernal. After the signal turned to red, petitioner made a right turn. His suspicions aroused, Bernal began to follow petitioner's car from a distance of about four car lengths. For several blocks, petitioner and Akins continued looking over their shoulders at Bernal. The Volkswagen then abruptly turned into a closed car wash, and Bernal waited in a service station across the street. When the Volkswagen pulled back onto the street, Bernal continued his surveillance. Petitioner then made a right turn without signaling. Bernal, observing petitioner's violation of local traffic laws, directed the Volkswagen to stop. Pet. App. A4-A5.

Petitioner got out of his car and approached Bernal, who informed petitioner of the reason for the stop, obtained petitioner's license, and asked petitioner to explain his behavior. Appearing very nervous, petitioner responded that he had been discussing "girlfriend problems" with his passenger, "Tim," and had become distracted. Bernal walked to the Volkswagen where, in response to Bernal's inquiry, Akins identified himself as "Michael Mayfield." Noting the discrepancy in names, Bernal radioed for a backup car. After a backup officer arrived, Bernal asked Akins for identification, and Akins produced a driver's license bearing the name "Timothy Akins." Bernal then placed Akins, who appeared evasive and ready to flee, in the back seat of his patrol car. Pet. App. A5-A6.

Bernal then looked into the Volkswagen with his flashlight and saw, on the floor behind the passenger's seat, a clear plastic bag that appeared to contain marijuana. Bernal arrested petitioner and Akins, and ordered a tow truck to remove their car. In an inventory search conducted pursuant to police department procedures, Bernal found two beepers, a shaving kit containing money, two bags containing marijuana and cocaine, and a loaded "Tech 9" semi-automatic pistol. Pet. App. A6.

2. Petitioner moved to suppress the evidence seized as a result of the search of the Volkswagen. The magistrate found that Officer Bernal had a reasonable and objective basis for stopping the Volkswagen, and that the ensuing search was valid. The magistrate rejected petitioner's claim that the stop was pretextual. That claim was based on Officer Bernal's testimony that he probably would not have stopped the car for the traffic violation if the car had not behaved so suspiciously. The district court agreed with the magistrate's recommendations and denied the motion to suppress. Pet. App. A7.

3. The court of appeals affirmed. The court rejected petitioner's contention that the stop in this case violated the Fourth Amendment because the "real reason" for the stop was the officer's suspicions, rather than the fact that the officer had observed a

traffic violation. Pet. App. A7. The court stated that "[w]hen an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle." *Id.* at A7-A8. The fact that the arresting officer also has "intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity" does not undermine the validity of the stop under the Fourth Amendment. *Id.* at A8.

In reaching that conclusion, the court relied on this Court's Fourth Amendment cases stating that the reasonableness of police conduct should be evaluated under an objective standard. Pet. App. A8, citing *Scott* v. *United States*, 436 U.S. 128, 136 (1978); *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985). The court of appeals held that under those cases " 'the officer's actual state of mind at the time the challenged action was taken' * * * is of no significance in determining whether a violation of the Fourth Amendment has occurred." *Ibid.*, quoting *Maryland* v. *Macon*, 472 U.S. at 470-471. Applying that principle, the court found that "Officer Bernal had a legitimate reason—the traffic violation—for stopping the green Volkswagen and that is the end of our inquiry." Pet. App. A9.

The court rejected petitioner's submission that it should apply a test that asks "not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose." Pet. App. A9, quoting *United States* v. *Smith*, 799 F.2d 704, 709 (11th Cir. 1986) (emphasis in *Smith*); see also *United States* v. *Guzman*, 864 F.2d 1512 (10th Cir. 1988). Although noting that the Tenth and Eleventh Circuits have applied that principle, the court found it inconsistent with this Court's

application of a standard of objective reasonableness in judging police conduct under the Fourth Amendment. The court therefore aligned itself with those circuits that have refused to apply a "pretext" analysis to stops that are adequately justified by objective criteria. Pet. App. A9, citing *United States* v. *Trigg*, 878 F.2d 1037 (7th Cir. 1989); *United States* v. *Causey*, 834 F.2d 1179 (5th Cir. 1987); and *United States* v. *Hawkins*, 811 F.2d 210 (3d Cir.), cert. denied, 484 U.S. 833 (1987).

ARGUMENT

Petitioner contends (Pet. 11-17) that the court of appeals erred in holding that a stop that is validly based on probable cause may not be challenged as pretextual, and he further claims that the court's decision conflicts with the approach employed in other circuits and by state courts. The court of appeals, however, correctly rejected petitioners' contention, and the issue presented in this case does not raise a conflict calling for this Court's review.[1]

1. This Court has repeatedly made clear that the validity of searches and seizures under the Fourth Amendment must be determined under "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." *Scott* v. *United States*, 436 U.S. 128, 138 (1978). In *Scott*, for example, the Court upheld the legality of a wiretap notwithstanding the officers' purposeful failure to comply with a minimization order. The Court explained that "the fact that the officer does

[1] This Court recently denied certiorari in a case raising the same issue as is presented in this petition, *United States* v. *Hope*, 906 F.2d 254 (7th Cir. 1990), cert. denied, 111 S. Ct. 1640 (1991), and there is no reason warranting a different result here.

not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138.

Subsequent cases reflect the same principle. In *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983), the Court, relying on *Scott*, rejected the contention that a Coast Guard check of a vessel's documentation was invalid because the officers had undertaken the check in response to "an informant's tip that [the] vessel * * * was thought to be carrying marihuana." In *Maryland* v. *Macon*, 472 U.S. 463 (1985), the Court applied an objective approach in rejecting the contention that police made a warrantless seizure of obscene material when they purchased it with marked money they intended to retrieve. The Court explained that the transaction, viewed objectively, constituted "a sale in the ordinary course of business," and it was "not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id.* at 470-471. And in *Graham* v. *Connor*, 490 U.S. 386, 397 (1989), the Court held that claims that police officers used excessive force must be analyzed under the Fourth Amendment pursuant to an objective standard of reasonableness, "without regard to their underlying intent or motivation." *Ibid.* See also *Horton* v. *California*, 110 S. Ct. 2301, 2308-2309 (1990) (rejecting claim that the warrantless seizure of evidence in plain view is invalid if the discovery of the evidence is not inadvertent; "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the

subjective state of mind of the officer"); *Florida* v. *Jimeno*, 111 S. Ct. 1801, 1803-1804 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").[2]

Applying those principles, the court of appeals properly rejected petitioner's claim that a stop based on probable cause may be scrutinized to determine whether it was, in fact, a pretext for an investigation. When police officers possess objective information establishing probable cause to believe that an individual has violated the law, a stop of that individual satisfies the Fourth Amendment's requirement of reasonableness. See *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). Inquiry into the officer's subjective motives for undertaking the arrest is not required. *United States* v. *Scott*, *supra*.

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[2] *United States* v. *Lefkowitz*, 285 U.S. 452 (1932), cited by petitioner (Pet. 12), does not support a different conclusion. Although the Court observed in *Lefkowitz* that "[a]n arrest may not be used as a pretext to search for evidence," *id.* at 467, the "only question presented" in that case was whether it was reasonable for police to conduct a general search of the rooms of a house in which an arrest was made as an incident of that arrest. *Id.* at 463. The Court's analysis considered only that issue, see *id.* at 463-467, and did not address the separate question presented here. In context, the opinion's statement that an arrest may not be used as a "pretext" for a search reflected the Court's condemnation of the practice of using an arrest warrant to justify a broad search of premises in which an arrest might take place. As Professor LaFave has observed, *Lefkowitz* "turns out upon close inspection to be of no help in answering th[e] question" of the validity of allegedly pretextual arrests. 1 W. LaFave, *Search and Seizure* § 1.4(e), at 91 (2d ed. 1987).

Nor is petitioner correct in contending (Pet. 13-15) that courts should inquire whether a reasonable officer, following general police practices, would have made the same stop absent other suspicions. Although that approach appears on the surface to refer to an objective benchmark, in practice it would compel an inquiry into the murky question of what a reasonable police officer would do in the myriad of situations as to which no formal police policy can be identified. Even where a standard police policy exists, it is not clear why departures from that policy would constitute a violation of the Fourth Amendment, where the stop is otherwise justified by probable cause. The contention that a "pretext" limitation is necessary in order to protect against the arbitrary exercise of police discretion misses the point that the requirement of probable cause itself imposes a sufficient restraint on police discretion in the context of vehicle stops. See *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979).

This case illustrates why the Fourth Amendment should not be interpreted to require courts to examine subjective motives or to enforce internal police procedures under a "pretext" analysis. Although Officer Bernal testified that he "probably" would not have stopped petitioner's car absent his suspicions going beyond the traffic offense, Pet. App. A7, it would make little sense to invalidate the stop based on a police officer's post-event speculation about what he might have done if the circumstances had been different. Nor does it make sense under the Fourth Amendment to ask whether a reasonable police officer following his normal practice would have made the stop. The laws prohibiting right turns without signaling are perfectly valid and enforceable quite apart from any

departmental policy purporting to restrict enforcement. Indeed, it may well be that police policy would judge it a wise use of resources for patrol cars to make traffic stops only if a more serious violation were suspected. The existence (or non-existence) of such an internal policy should not affect the issue of whether the Constitution has been violated by a particular stop.

2. In keeping with this Court's direction that police action implicating Fourth Amendment rights be judged in light of an objective standard, a majority of recent court of appeals decisions have upheld objectively valid police actions against claims that they were pretextual. See, *e.g.*, *United States* v. *Trigg*, 925 F.2d 1064, 1065 (7th Cir. 1991) ("it is sufficient that the officer had probable cause to arrest and that he lawfully effectuated the arrest"; rejecting pretext inquiry); *United States* v. *Causey*, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc) ("in a case where the officers have taken no action except what the law objectively allows their subjective motives in doing so are not even relevant to the suppression inquiry"); cf. *United States* v. *Nersesian*, 824 F.2d 1294, 1315-1317 (2d Cir.) (upholding an objectively reasonable *Terry* frisk, despite defendant's claim that it was a pretext for a search to investigate officer's suspicions), cert. denied, 484 U.S. 957 (1987); *United States* v. *Hawkins* 811 F.2d 210, 213-215 (3d Cir) (upholding stop based on the officers' objectively reasonable suspicion that defendant was engaged in narcotics activity, despite the officers' testimony that the purpose of the stop was to investigate a traffic violation), cert. denied, 484 U.S. 833 (1987).

The decisions on which petitioner relies (Pet. 12) do not establish a conflict among the circuits that

warrants this Court's review. In *United States* v. *Smith*, 799 F.2d 704, 708-709 (11th Cir. 1986), the police stopped a car ostensibly to investigate a traffic violation; the defendant claimed the stop was a pretext to investigate more serious offenses. The court held that a traffic stop that is based on reasonable suspicion could be challenged as pretextual, if a reasonable officer would not have made the challenged stop absent suspicions of other illegal activity. The court did not hold, however, that a stop based on *probable cause* may be invalidated because of the officer's alleged ulterior motives, or because the arresting officer departed from what is said to be the usual practice with respect to similar violations. *Smith* explicitly declined to address the question, which is presented here, of "when, if ever, a stop for probable cause resulting from an observed traffic violation might be invalid as pretextual." 799 F.2d at 709. Subsequent Eleventh Circuit cases have continued to leave that issue open. See *United States* v. *Dunkley*, 911 F.2d 522, 525 (11th Cir. 1990), cert. denied, 111 S. Ct. 765 (1991); *United States* v. *Strickland*, 937 F.2d 937, 940 (11th Cir. 1990).[3]

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[3] Even farther afield are several other cases that petitioner appears to believe (Pet. 12) are in conflict with the decision of the court of appeals in this case. The Fifth Circuit cases cited by petitioner were expressly overruled in *United States* v. *Causey*, 834 F.2d at 1184. In *United States* v. *Santana*, 485 F.2d 365, 367-388 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974), the court did not reach the issue presented here because it found that the challenged stop was valid under *Terry* v. *Ohio*, 392 U.S. 1 (1968). Finally, although language in *Taglavore* v. *United States*, 291 F.2d 262 (9th Cir. 1961), supports use of a pretext analysis, that decision, which predated this Court's decisions in *Scott* and its progeny, has not been applied to invalidate a stop in the 30 years since it was decided.

One circuit has adopted an approach that is at variance with the decision in this case. In *United States* v. *Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988), the court expressed the view that "the pretextual use of police power may violate the Fourth Amendment," even where the police have observed a traffic offense that would otherwise justify a stop. The court acknowledged that a pretext claim should not involve "an inquiry into the officer's subjective intent," but concluded that "an objective analysis of the facts and circumstances of a pretextual stop is appropriate," *id.* at 1515, to consider "not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose." *Id.* at 1517.

Although *Guzman* recognizes a form of pretext claim that other circuits have rejected, we do not believe that review of that issue is warranted here. Even under the approach adopted in *Guzman*, petitioner would not prevail on the record in this case, because petitioner presented no evidence on the "general police practice[s]" governing the type of traffic stop involved in this case. See *Guzman*, 864 F.2d at 1518 (rejecting pretext claim before it because of the absence of proof of "general police practice" with respect to a particular traffic stop). Moreover, the Tenth Circuit's holding in *Guzman* has proved to be an extremely narrow rule in that circuit; to our knowledge, no pretext claim asserted under *Guzman* has succeeded. See, *e.g.*, *United States* v. *Neu*, 879 F.2d 805, 808 (10th Cir. 1989); *United States* v. *Erwin*, 875 F.2d 268, 272 (10th Cir. 1989); *United States* v. *Rivera*, 867 F.2d 1261, 1263-1264 (10th Cir. 1989). In light of the narrowness with which *Guzman* has been applied, and the fact that petitioner

would not benefit from application of *Guzman* to him in any event, we do not believe that review is warranted in this case to resolve the conflict between the Tenth Circuit and the other courts of appeals.

Nor do the state cases cited by petitioner (Pet. 13) suggest the existence of a more widespread conflict that would justify this Court's intervention. As reflected in petitioner's citations, most of the state courts that have addressed the issue agree with the approach adopted by the court of appeals in this case, and none of the state cases he cites creates a square conflict with the decision in this case. Two of the cases claimed by petitioner to follow *Smith* or *Guzman* involve only investigative stops based on reasonable suspicion rather than stops based on probable cause, the situation presented in this case, and in any event those cases are only decisions of intermediate appellate courts in the state systems. See *Brown* v. *State*, 188 Ga. App. 184, 186-187, 372 S.E.2d 514, 516 (1988); *State* v. *Morocco*, 99 N.C. App. 421, 427, 393 S.E.2d 545, 548 (1990). In another case cited by petitioner as following *Smith*, the court allowed a pretext claim when an officer had made a stop only to "advise" the defendant that he had a bald tire. *Monroe* v. *State*, 543 So.2d 298, 299 (Fla. 1989). And in the fourth case, the court did not even determine whether stops may be challenged on pretext grounds, because it found that the stop before it was valid even if pretext challenges were permitted. *State* v. *Garcia*, 461 N.W.2d 460, 463-464 (Iowa 1990).[4]

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[4] Petitioner also errs in suggesting that two States vacillate between accepting and rejecting pretext challenges. Texas has firmly rejected any form of pretext challenge, see *State* v. *Garcia*, 794 S.W.2d 472, 477-478 (Tex. Crim. App. 1990), as has Illinois, see *People* v. *Sorrells*, 209 Ill.App. 3d, 568 N.E.2d 497 (4th Dist. 1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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